Fair Political Practices Commission
Memorandum

To: Chairman Randolph, Commissioners Blair, Downey, Karlan and Knox

From: John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Approval of 2005 Regulatory Priorities

Date: September 21, 2004

I. INTRODUCTION AND METHODOLOGY

This memorandum outlines the staff's recommendations for the Commission's regulatory priorities in Calendar Year 2005. Historically, this first discussion memorandum presents the recommendations in narrative form. Generally, the final memorandum, in December, will show the proposed regulations on a chronological table.

Regulatory ideas were solicited from staff in all of the divisions. In addition, staff investigated regulatory proposals that were considered in the past but due to workload were not pursued. Once the proposals were collected, staff provided the list to executive staff for their review and guidance.

The final memorandum contains those items that the executive staff believed were most urgent and would be manageable in light of the current fiscal and staff constraints. Staff was also mindful of the fact that the Commission has already committed to several projects that were started in 2004 and will continue into 2005.

Staff requests that the Commission approve or disapprove each of the recommendations. Based upon those decisions, the staff can return in December with a formal calendar setting out dates for these items on which the Commission may take final action. The final table will reflect staff's proposals regarding which items require interested person meetings, pre-notice hearings, and adoption hearings.

As in prior years, the rulemaking plan will also allow for quarterly review and revision and will attempt to spread the workload as evenly as possible throughout the year, noting some nonregulatory projects as well.

II. STATUTE[1] POSSIBLY NEEDING REGULATORY INTERPRETATION IN 2005

As of the writing of this memorandum, only one bill has been enrolled to the Governor that may require regulatory action. Other conforming changes necessitated by passage of legislation will be included in the technical packet.

SENATE BILL 604 (2004-2005), PERATA, Regulation 18116: Filing Dates.

SB 604 was signed by the Governor and went into effect on September 10, 2004. It amends §§ 84203 and 84204 to, in effect, consolidate the late reports with the 24-hour election cycle reports required under §§ 85309 and 85500 (added by Proposition 34).

Regulation 18116 provides that whenever a filing deadline under the Act falls on a Saturday, Sunday, or official state holiday, the deadline is extended to the next business day. The regulation specifically excludes late contribution and late independent expenditure reports required under §§ 84203 and 84204. In other words, reports required to be filed within 24 hours during the 16-day late reporting period are not allowed the next business day extension.

Staff proposes to amend regulation 18116 to clarify that all reports required to be filed within 24 hours, including the reports filed under §§ 85309 and 85500, are not allowed the next business day extension.

III. NEW AND CONTINUING PROJECTS

A. Large Projects. These projects will require more than one meeting (Commission meetings or interested person meetings) and a significant amount of staff preparation time.

1. **(a) Affiliated Entities (18428)**: Discusses reporting by "affiliated entities." May be further amended to clarify application of the aggregation provisions to local candidates and committees, add a definition of "affiliated entities" or codify other advice in the area. [Carried over from last year.]

   (b) Aggregation under § 84308: Section 84308 disqualifies any "officer" of a public agency, who is running or has run for elective office, from participating in decisions affecting his or her campaign contributors. The statute provides that when a closed corporation is a party (or participant), the majority shareholder of the corporation is also a party (or participant). This project considers whether further clarification of this aggregation rule is necessary. [Carried over from last year.]

[1] A copy of the bill is attached at Appendix 1.

2. **Requiring Political Parties to Deposit Hard and Soft Money into Separate Bank Accounts (Prop. 34):** Section 85303(a) prohibits recipient committees, other than candidate controlled and political party committees, from accepting any contribution totaling more than $5,000 per calendar year for the purpose of making contributions to candidates for elective state office. Section 85303(b) prohibits political party committees from accepting any contribution totaling more than $25,000 per calendar year for the purpose of making contributions to candidates for elective state office. Section 85303(c) provides that there are no limits on contributions to recipient committees and political party committees provided that the contributions are used for purposes other than making contributions to candidates for elective state office. Prior to the November 2002 general election, 21st Century Insurance Company gave contributions in excess of $25,000 to various political party committees, which, in turn, deposited the contributions into an account that was used for both candidate support and non-candidate support purposes. Some of these contributions were then passed on to other political party committees, who used the excessive funds to make contributions to candidates in contravention of § 85303(c). Proposition 34 does not expressly require that contributions in excess of the $5,000 or the $25,000 contribution limits be deposited into separate non-candidate support accounts. However, without such a requirement, recipient committees and political party committees can easily circumvent or inadvertently violate contribution limits. Once funds are designated as "non-candidate support funds," such funds should retain their character regardless of the number of committees through which the funds are transferred.

   A regulation to address the problem should do the following:

- Require that contributions in excess of the $5,000 or the $25,000 contribution limit be deposited in an account that is separate from any account used to make contributions to candidates.

- Require that the name of the non-candidate support account include the words "non-candidate support."

- Prohibit the making of contributions from non-candidate support accounts.

- Require committees and political party committees to notify other committees to which non-candidate support funds are transferred that the funds may only be used for non-candidate support.

- Permit committees and political party committees to allocate or transfer up to $5,000 or $25,000 of an excessive contribution to a candidate support account from a non-candidate support account provided that the transfer does not violate any contribution limits and the reportable source for the contribution is the original contributor.

3. **"Public Generally" and "Legally Required Participation" as Affirmative Defenses to an Enforcement Action:** Under the eight-step process for determining whether a public official has a disqualifying conflict of interest in a governmental decision, the last two steps, determining whether the public generally exception applies to the decision, or whether the official is legally required to participate in the decision, are affirmative defenses to a conflict of interest violation. However, there is no regulatory provision that expressly declares that to be the case.

   The Proposal for Regulatory Change: Staff proposes that Regulation 18700 be amended at (b)(7) and (b)(8). Subdivision (b)(7) would be amended to provide that in an enforcement action brought pursuant to § 87100 the public official has the burden of proving that the reasonably foreseeable material financial effect on his or her economic interest is indistinguishable from the effect on the public generally. Subdivision (b)(8) would be amended to provide that in an enforcement action brought pursuant to § 87100 the public official has the burden of proving that his or her participation is legally required.

B. Medium Projects. These projects may require more than one Commission meeting and a significant amount of staff preparation time. They appear to be less time intensive than the "Large Projects" set forth above.

1. **Govt. Code § 1090 Merger Project**. The Commission previously decided to solicit public input in a study of the possible merger of conflict-of-interest laws that are not currently in the Act into the framework of the Act. Under consideration for merger are §§ 1090 et seq. and Public Contracts Code §§10410 et seq. [Carried over from last year.]

2. **(a) Sections 87202 and 87204**: **Assuming and Leaving Office Statements.** Staff is recommending that the Commission adopt a regulation clarifying when an official has assumed or left office triggering the filing of statements of economic interest. Currently, Commission advice for statements of economic interests may be different than the interpretation used in the revolving door context. [Carried over from last year.]

   (b) Alternates and Designees. Staff is also asking the Commission to consider a regulation clarifying filing requirements for alternates and designees. [Carried over from last year.]

   (c) Regulation 18735: Assuming Office Statements for Previously Designated Employees. This regulation should be amended to cover other situations in which it is unnecessary to require leaving and assuming office statements (like when a legislative employee becomes a legislator). The regulation also needs other technical corrections.

3. **Confidentiality of Enforcement Cases:** Historically, it has been the policy of the Commission to keep confidential the existence of any agency investigation into a suspected violation of the Act until after a Probable Cause Order has been issued regarding the violation, or the investigation has resulted in the submission of an administrative stipulation to the Commission or the filing of a civil complaint. It has also been the policy of the Commission to keep confidential any information discovered during the course of an investigation until after the investigation has been concluded, and any resulting prosecution has been concluded. However, there is no governing regulation or statute expressly supporting this general policy.

   Currently, only one PRA section and one Commission regulation address the issue of the confidentiality of enforcement matters. Additionally, both the statute and regulation are narrow in their application. § 90005 governs the confidentiality of Franchise Tax Board ("FTB") staff discovery of any particulars of any record, documents or information he or she receives by virtue of conducting an audit, except in furtherance of the work of the FTB or in connection with any court proceeding or any lawful investigation of any agency. Additionally, regulation 18361.4(d) requires Probable Cause Conferences to be closed to the public. Neither of these provisions provides for the confidentiality of FPPC investigations, or the confidentiality of the information, documents, etc. that are discovered in the course of such an investigation. As a consequence, when asked by reporters or members of the public to justify why the Commission will not release information about its pending investigations, staff can only respond that to do so would be contrary to Commission policy.

   Enforcement Division staff therefore proposes the addition of a regulation, interpreting § 83115 that expressly provides for the confidentiality of Agency investigations, describing the scope of that confidentiality, consistent with the Public Records Act, and any exceptions we may want to build into it. This regulation could take the form of an amendment to existing regulation 18362, governing "Access to Complaint Files." The addition of a confidentiality regulation would provide support for the Commission's current policy regarding confidentiality and would provide a tool for use in responding to press and public inquiries regarding pending enforcement matters.

4. **Disgorgement of Laundered Contributions:** Section 85701 of Proposition 34 requires any candidate or committee that receives a laundered contribution to pay to the General Fund the amount of the contribution. The statute, however, is silent on the mechanism for disgorging the contribution.

   For example, a local newspaper article reports that a local developer laundered contributions to the mayor of the city. The following day, the Commission receives a complaint. Several months later, the Commission and the developer reach a stipulated agreement, in which the developer admits to laundering the contributions and agrees to pay a monetary penalty. The scenario raises several questions

regarding the application of § 85701. At what point is the mayor required to disgorge the contribution? Is it at the time the newspaper article was published and the mayor was put on notice of the laundering violation, at the time that a complaint was filed, at the time that the FPPC concluded its investigation and determined that laundering occurred, or at the time that administrative enforcement proceedings have concluded? Should the FPPC send a letter to the mayor notifying him of the violation and demand that the mayor disgorge the funds? What is the time period for compliance? What if the mayor has left office, terminated his committee, and no longer has any campaign funds? What if the mayor upon reading the article transfers all of his campaign funds to another committee? Does the disgorgement requirement apply to the candidate and all of his committees, or to the specific committee that received the laundered contributions? Who receives the disgorged funds, the state or local entity?

5. **Extensions of Credit:** Section 85307. This regulatory project will examine whether the Commission should consider adoption of a regulation addressing extensions of credit. Staff believes it would be useful to examine whether "extensions of credit" should apply to the provision of goods and services by vendors, in order to clarify when the provisions of goods or services is an accrued expense and when it is a contribution. The staff would also like to explore whether the term should instead refer to "a line of credit." [Carried over from last year.]

6. **Precedential Decisions in Enforcement Actions:** Section 11425.60 of the California Administrative Procedure Act provides general authority to the Commission to designate decisions as precedential. However, the parties and the Commission itself have no policy direction as to what decisions would be appropriate for designation as precedential. In one case where a proposed decision was challenged, both parties simply requested that a decision be designated as precedential without laying out any reasons as to why the case was appropriate for such a designation. A regulation would address this issue, by setting forth various criteria for the Commission to consider in determining whether to designate a decision as precedential. Moreover, the presence of an implementing regulation would facilitate the use of precedential decisions by the Commission as an additional policy setting tool. Currently, there is a gap in Commission policy direction in the enforcement arena, in that opinions and advice letters, because of their express limitations, only deal with prospective substantive issues involving the appropriate interpretation of the Act. As such, opinions and advice letters cannot address remedial, evidentiary, and other purely enforcement issues where policy direction from the Commission might be helpful.

   The Proposal for Regulatory Change: As alluded to above, § 11425.60 provides general statutory authority for a regulation governing the issuance of precedential decisions after hearings held under the Administrative Procedure Act. The proposed regulation would set forth criteria and mechanisms for designating a decision as precedential. Several other state administrative agencies have such

regulations. As an example, the criteria used by the Board of Control are as follows: (c) A decision may be designated as a precedent decision if it: (1) addresses a legal or factual issue of general public interest; (2) resolves a conflict in the law; (3) provides an overview of existing law or policy; (4) clarifies existing law or policy; (5) establishes a new rule of law or policy; or (6) contains a significant legal or policy determination of general application. (2 CCR § 619.7.)

In a similar vein, the Commission could set forth discrete factors and/or considerations present in a given case or potential decision that would make it suitable for designation as being precedential. Such factors could be set out with greater or lesser specificity than the above example and would be tailored to the Commission's objectives in adopting a precedential decision regulation. In terms of the mechanics of issuing a precedential decision, the regulation might address any variance in the briefing or the Commission hearing processes that might accompany the precedential decision designation process, the overruling of past precedential decisions, and the indexing of such decisions.

7. **Regulations 18741.1; 18746.1:** Permanent Ban on Post-Employment Activities. This project involves proposed amendments to regulation 18741.1, relating to the "permanent ban" on post-employment activities. Under the Political Reform Act, former officials in state government are prohibited from attempting to influence proceedings in which they participated when under governmental employment. (§§ 87401 and 87402.) A former official has "participated" where he or she has had "personal and substantial" involvement in the proceeding. In 1999, the Commission adopted regulation 18741.1 interpreting §§ 87401 and 87402. That regulation provides that a supervisor is deemed to have participated in any proceeding which was "pending before" the official's agency and which was under his or her supervisory authority. In the *Lucas* Opinion, O-00-157, the Commission interpreted this regulation in the context of a high-level official of the Board of Equalization. In so doing, the Commission concluded that even though the official technically had "supervisory authority" over all employees under his chain of command, the official was not a "supervisor" of those employees within the meaning of the regulation, and therefore, did not participate in audits conducted by the lower-level employees. The Commission distinguished this interpretation with the 1990 Commission interpretation reflected in the *Brown* Advice Letter, No. A-91-033, which applied the ban to the former chief of the Enforcement Division of the Commission. The Commission instructed staff to amend regulation 18741.1 to reflect this distinction. It is anticipated that other technical changes may also be made to this regulation and regulation 18746.1. However, since the regulatory amendment would be a conforming change (the *Lucas* Opinion has already resolved the issue), this has been placed at a lower priority.

C. Quicker Projects. These projects may require only an adoption hearing before the Commission.

1. **Section 87302:** A regulation is necessary designating a filing officer for statements of economic interests filed by employees of state agencies that go out of business (e.g., DOIT, OCJP).

2. **Section 87350:** A regulation is needed clarifying the Statement of Economic Interests filing deadline for designated employees serving more than one joint powers insurance agency who elect to file a "multiagency" statement under § 87350.

3. **Regulation 18570:** Return of Contributions with Insufficient Donor Information. An amendment is needed to this regulation to establish a timeline and process for turning money over to the General Fund if a contribution is refunded and the contributor fails to cash the refund check.

4. **Excluding Appointments And Unique Financial Effects From The Governmental Salary Exception:** The purpose of the conflict-of-interest provisions of the Act is to ensure that public officials do not participate in governmental decisions in which they have a financial interest. In general, a decision affecting the governmental salary of an official or his or her spouse does not give rise to a conflict of interest unless the decision has a unique effect on the official or his or her spouse as described in regulation 18705.5. In applying the governmental salary exception as described in regulation 18705.5, the Enforcement Division has discovered two problems.

   First, in 1997, the mayor of Oakland appointed his spouse to an unsalaried position on the Oakland Port Authority. At the time, the Oakland City Attorney advised the mayor that he did not have a conflict of interest that prohibited him from making the appointment, even though his spouse received perks as a result of the appointment. The city attorney based her advice on the language of the regulation, which refers to hiring and firing, but does not refer to appointing.

   Second, in 1997, the executive director of the Victor Valley Community College made a decision to significantly increase his spouse's salary. His spouse was a manager at the college and the only one in her classification. The Enforcement Division was not able to pursue the case because the language of the regulation did not make the conduct a violation. Although the regulation did not make the conduct illegal, the Enforcement Division found an advice letter that indicated such conduct was in violation of the Act. In the advice letter, we advised a member of the North County Community College District that he would have a conflict of interest in any decision that would have a "unique effect" on his spouse. (*White* Advice Letter, No. I-90-547.)

The Proposal: Enforcement proposes amending the governmental salary exception in regulation 18705.5(b) as follows: "The financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a federal, state, or local government agency shall not be deemed material, unless the decision is to appoint, hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family, or to set a salary for the official or a member of his or her immediate family, and the salary ~~which~~ is different from salaries paid to other employees of the government agency in the same job classification or position, *or the official or member of his or her immediate family is the only person in the job classification or position."*

By adding the word "appoint" to the regulation, the Commission would make it clear to a public official, and his or her legal advisor, that it is unlawful for a public official to appoint the official or his or her spouse to a position that is salaried, or that is unsalaried but offers monetary benefits. By adding the suggested language to the end of the regulation, the Commission would make it clear to a public official, and his or her legal advisor, that it is unlawful for a public official to increase the governmental salary of the official, or his or her spouse, when the official or his or her spouse is the only individual in the job classification or position.

IV. OTHER MISCELLANEOUS ITEMS

Annual Technical Clean-up. The Commission considers annually changes to Commission regulations that resulted from the staff's review for technical and other minor changes.

Appendix 1: SB 604